Filed 4/15/03 P. v. Lira CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY J. LIRA, Defendant and Appellant.	B156720 (Los Angeles County Super. Ct. No. SA041440)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elden S. Fox, Judge. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Susan S. Kim, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Anthony Lira (Lira) was convicted after a jury trial of making criminal[1] threats (Pen. Code, § 422[2]); unlawful firearm activity (§ 12021, subd. (e)); and possession of a firearm by a felon (§ 12025, subd. (a)(1)), with the additional allegation found true that he had suffered a prior conviction for voluntary manslaughter within the meaning of sections 667, subdivisions (a)(1) and (b) through (i), and 1170.12, subdivisions (a) through (d). Sentenced to nine years in prison, Lira appeals his conviction and sentence on the following grounds: (1) the sufficiency of the evidence to sustain his conviction of making criminal threats; (2) the sufficiency of the evidence supporting his conviction for being a felon in possession of a firearm; (3) the alleged failure of the trial court to obtain a knowing and intelligent admission by Lira to his prior conviction; (4) the trial court's imposition of consecutive, rather than concurrent sentences; and (5) the use by the trial court of CALJIC No. 17.41.1 (jury misconduct). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Early in the morning of Valentine's Day, 2001, Lira and his friend Damien Jarin (Jarin), guests of a registered guest of the Mondrian Hotel, sought admission to the hotel bar—the Sky Bar—and were admitted by security guard Edward Estese (Estese). Estese was later summoned to the Sky Bar because of a disturbance. Estese, joined by two other hotel security guards, approached and then learned that there was a difficulty in securing payment from Lira and Jarin for their $28 bar bill. Jarin presented $20 and stated that Lira, who had by that time left the bar and entered the hotel lobby, possessed the rest of

[1] The offense of making criminal threats is also referred to as "terrorist threats."

[2] All further statutory references are to the Penal Code unless otherwise indicated.

their money. Estese left the bar, located Lira near the hotel elevators, and requested that he return to the bar to settle the bill. Lira complied and paid the remainder of the bill.

After paying the bill, Lira became belligerent toward Estese, who was still accompanied by two other security guards. Lira reached into his jacket as though he were reaching for a weapon, and said in a loud voice believed by Estese to be threatening, "Y'all niggers don't want to die tonight." Estese understood Lira's look to be "very serious, very threatening." Estese "thought maybe he had a gun or maybe he was just posturing. [He] was not sure." Estese said he was "concerned," but with two other guards beside him he "wasn't afraid." Estese attempted to ease the conflict by urging Lira and Jarin to retire to their hotel room for the night. He ushered them from the bar to the hotel elevators.

Estese resumed his regular duties, but within approximately five minutes he received another radio call for security—this time a report of loud men on the third floor of the hotel. Estese, alone, took the elevator to the third floor to investigate the disturbance. When the elevator doors opened, he saw Lira and Jarin arguing in the hotel hallway approximately five feet away. When Lira saw Estese, facing Estese squarely and with a "menacing" "leer" on his face, Lira "reached into his jacket again in the same manner he had reached into his jacket down at the Sky Bar."

Estese was "petrified," believed Lira had a gun, and was afraid that Lira would shoot him. Estese feared for his life. He later explained that the third-floor encounter caused him fear because the surrounding conditions had changed. He testified, "[T]he first time he was outnumbered; so I thought there was a possibility he had a gun, but there was also the possibility that he was just putting on a show to seem like he had a gun just to back us off of him. The second time I was by myself; so I was outnumbered. I didn't have a weapon, and he still did the same thing, reached for the gun." Estese noticed that Lira appeared to be drunk, and believed that Lira could carry out his threat.

Estese averted his eyes slightly to appear less antagonistic, keeping Lira in his peripheral vision. Estese asked Jarin to step into the elevator with him because Jarin

"seemed . . . to be the most reasonable, most willing to talk." Estese asked Jarin to step into the elevator rather than leaving the elevator himself because he was afraid that if he stepped from the elevator and Lira began shooting, he would have no means of escape.

Jarin entered the elevator and asked Estese to open the door to Jarin's guest room. Although Estese had a master key, "as a ploy to get away," he claimed that hotel policy required the guest to go to the front desk and show identification to get a replacement key. He pressed the button for the first floor and rode down to the first floor with Jarin. Jarin became angry, and when the elevator reached the first floor, Estese pressed the third floor button to return the elevator upstairs. He told Jarin that he would get a master key and return to the third floor. Estese immediately asked the hotel operator to summon the police.

The police responded within approximately seven minutes, and it took approximately four minutes for Estese and the police to reach the third floor after the police arrived. The police recovered a semi-automatic pistol from Lira's jacket pocket and a magazine containing seven bullets from Lira's pants pocket.

Lira was arrested and charged with four offenses: criminal threats (§ 422); unlawful firearm activity (§ 12021, subd. (e)); possession of a firearm by a felon (§ 12021, subd. (a)(1)); and possessing a concealed firearm (§ 12025(a)(2)). The information also alleged that Lira had previously been convicted and adjudicated a ward of the court for voluntary manslaughter and that this offense satisfied the requirements of sections 667, subdivisions (a)(1) and (b) through (i), and 1170.12, subdivisions (a) through (d) for increasing the sentence imposed. The trial court dismissed the charge of possessing a concealed firearm prior to trial in the interest of justice.

At the close of evidence in Lira's trial, the trial court instructed the jury with, inter alia, CALJIC No. 17.41.1, concerning juror misconduct. Lira's counsel did not object to this instruction.

The jury retired to select a foreperson on January 10, 2002 and began deliberations the following day. Over the course of the day, the jury submitted two notes to the court

and asked for Estese's testimony to be read back. First, the jury asked whether the court could provide additional guidance as to whether the two "threats" at the Sky Bar and on the third floor of the Mondrian Hotel "should be treated as (i) separate and distinct threats, or (ii) as an integrated threat for purposes of the criminal threat charge?" In response to this question, the trial court instructed the jury to review the "CALJIC instruction re Terrorist Threat[s] and assess [the] language of necessary elements."

The jury's second communication stated, "The jury has reached a verdict with regard to charges 2 and 3. With regard to charge 1 [criminal threats], the jury agreed at approximately 10 a.m. this morning that there were two issues that were under dispute among the jury members; one member of the jury disagreed with the remaining members of the jury regarding these issues. We spent the remainder of the morning and the afternoon trying to reach agreement on these issues, but we have been unsuccessfull [sic] and that one juror said that there is no possibility that he will change his mind."

The court ordered the jury foreperson into the courtroom. The foreperson confirmed that the "issues" referred to in the second note were the same as the issue described in the first note from the jury. The court inquired whether the holdout juror "is not deliberating with you or just disagrees with the rest of the jurors?" The foreperson explained, "My opinion is he just disagrees. Some of the other jurors believe he's being hard headed and not deliberating, but I think he had his reasons and he's been explaining what his reasons are, but we've been basically going back and forth trying to see if we can convince him and giving different views." The trial court asked whether the foreperson saw any reason to inquire whether the juror was refusing to follow the law, and the foreperson replied negatively, confirming that the juror in question was actively involved in deliberations.

The trial court then asked the foreperson whether there was anything the trial court might do to assist in the deliberations, and the juror replied that they wanted legal guidance in interpreting the events in the bar and on the third floor as one threat or two. The foreperson believed that only this information, and no other instructions, would assist

the jury. The jury, when brought into the courtroom, agreed. The trial court instructed the jury with a statement from *People v. Solis* (2001) 90 Cal.App.4th 1002. The court said, "I am going to read to you a statement, and that statement is for guidance purpose only, and you must utilize this in conjunction with the instruction that you've been provided. Okay. [¶] 'A threatening statement does not have to be the sole cause of a person's fear and that a statement the victim does not initially consider a threat can later be seen that way based on any subsequent act or conduct taken by a defendant.'" The trial court again cautioned the jury to follow the jury instructions, and the jury retired to deliberate further.

The jury returned its verdicts within a few minutes. Lira was convicted on all counts. Lira waived a jury trial on his prior conviction and then admitted his prior manslaughter offense. Lira was sentenced to the low term of 16 months for the criminal threats charge, doubled pursuant to section 1170.12, subdivisions (a) through (d), for a total of 32 months on count 1. The trial court imposed one-third the midterm sentence on count 2—8 months—doubled that term pursuant to section 1170.12, subdivisions (a) through (d), and then added a five-year enhancement under section 667, subdivision (a)(1), for a total of 6 years and 4 months on count 2. The court ordered that the sentence for count 2 be served consecutively to the sentence for count 1. A 16-month sentence for count 3, possession of a firearm by a felon, was stayed pursuant to section 654. Lira's total sentence was nine years, partially offset by 210 days of presentence custody credits. This appeal followed.

DISCUSSION

I. The evidence was sufficient to convict Lira of making criminal threats.

Section 422 makes a criminal offense a threat to commit a crime that will result in death or great bodily injury to another person if the threat, "on its face and under the

circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety . . . ." Lira contends that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that Lira placed Estese in sustained fear, and that therefore his conviction must be reversed.

"When a jury's verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury." (*People v. Brown* (1984) 150 Cal.App.3d 968, 970.) We review the record in the light most favorable to the judgment and determine whether it discloses substantial evidence such that a rational trier of fact could find Lira guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We conclude that the evidence is sufficient to sustain Lira's conviction.

People v. Solis (2001) 90 Cal.App.4th 1002 (*Solis*) is applicable. In *Solis*, the defendant left a series of messages on his ex-girlfriend's answering machine threatening that he was driving to her home to set fire to it and to kill her. (*Id*. at p. 1009.) The court held that the defendant's conduct after the verbal statement—setting fire to the ex-girlfriend's apartment building using an accelerant thrown through the ex-girlfriend's bedroom window—could be considered in determining whether a criminal threat was made. The court stated, "[I]t is clear a jury can properly consider a later action taken by a defendant in evaluating whether the crime of making a terrorist threat has been committed. . . . The point is that all of the circumstances can and should be considered in determining whether a terrorist threat has been made. It therefore follows that the court, in response to the jury's questions, properly informed the jury that the threatening statement does not have to be the sole cause of the victim's fear and that *a statement the*

victim does not initially consider a threat can later be seen that way based upon a subsequent action taken by a defendant . . . ." (*Id.* at p. 1014, italics added.)

Here, the trial court quoted the above language from *Solis* in response to the jury's request for additional instruction. The trial court correctly instructed the jury that the subsequent actions of the defendant could be considered in determining whether defendant committed the offense of making criminal threats. (*Solis*, *supra*, 90 Cal.App.4th at p. 1014; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1221 ["Defendant's words, combined with the surrounding circumstances, are susceptible to an interpretation that defendant made a grave threat to Iorio's personal safety. . . . Defendant's activities after the threat give meaning to the words and imply that he meant serious business when he made the threat"]; *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1342 [even if victim "did not begin to seriously fear for her life until after she learned" that gang members affiliated with the defendant were looking for her, her fear while waiting for police response and the arrest of the defendant satisfied element of sustained fear].)

Applying *Solis* to this case, the evidence is sufficient to establish that Estese experienced sustained fear as a result of the threat when—only minutes after Lira made the statement in the Sky Bar—the circumstances changed so that Estese was now alone with Lira and Jarin rather than in the presence of the other security guards. When Lira repeated the non-verbal action that had accompanied the verbal threat, again reaching into his jacket as though to draw a gun, Estese—unarmed—took the earlier statement seriously, feared for his life, and believed that Lira had a gun and might shoot him. Estese devised a ploy to distance himself from Lira and to summon the authorities, returning approximately 10 minutes later with police. Estese also testified that the events "shook [him] up" sufficiently that he resigned his job as a security guard and now worked only as a bellman. This evidence is sufficient to support the element of sustained fear.

Lira seeks to limit the rule of *Solis* to situations in which the statement alleged to be a threat is vague or ambiguous, and argues that *Solis* has no application here, when the

language used by the defendant is not vague or ambiguous in meaning. The *Solis* decision is not susceptible to this interpretation. First, in *Solis*, the language of the threats was extremely clear, including such phrases as "I'm going to kill you." (*Solis*, *supra*, 90 Cal.App.4th at p. 1009.) Second, the court in *Solis* specifically noted that the admissibility of subsequent actions by the defendant does not depend on whether the threat was vague or ambiguous. As the *Solis* court wrote, "The fact that in those [earlier] cases the verbal threat was vague or ambiguous whereas in this case the threats left by defendant on the answering machine were not ambiguous is not dispositive." (*Id*. at p. 1014.)

Lira nonetheless argues that *Solis* does not permit a conviction of criminal threats when the victim of the threat was not afraid until the subsequent events took place. *Solis*, however, is not so limited. *Solis* specifically allows that "a statement the victim does not initially consider a threat can later be seen that way based upon a subsequent action taken by a defendant (e.g., setting fire to the victim's apartment)." (*Solis*, *supra*, 90 Cal.App.4th at p. 1014.) This holding necessarily contemplates that the sustained fear required by section 422 may be delayed until the victim construes the statement as a threat. If the victim does not immediately view the statement as a threat—and *Solis* establishes that this is no impediment to a conviction for criminal threats if subsequent conduct by the defendant leads the victim reasonably to interpret the statement as a threat—the sustained fear of execution of that threat correspondingly would not set in until the subsequent actions convinced the victim that the statement was a threat. The second hand gesture would not necessarily have had any meaning for Estese absent Lira's earlier verbal threat accompanied by the original hand gesture.

Solis and section 422 allow subsequent conduct by the defendant to be considered as "the circumstances under which [the statement] was made" in determining whether a statement constituted a criminal threat—whether the statement, when understood to be a threat, was so "unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the

threat." (§ 422.) Any other conclusion would be contrary to *Solis* because it would mean that the victim would have to be in fear *before* he or she considered the statement to be a threat, a logically untenable requirement. There is no requirement in section 422 that the victim's fear be caused immediately by the threat. The trial court properly instructed the jury with the language from *Solis*, and the evidence is sufficient to support Lira's conviction for making criminal threats.

II. The evidence was sufficient to support a conviction on count 3 for being a felon in possession of a firearm.

In 1995, Lira was adjudicated a ward of the court pursuant to Welfare and Institutions Code section 602 for committing voluntary manslaughter (§ 192, subd. (a)), an offense listed in section 707 of the Welfare and Institutions Code. This prior offense was pertinent to two of the offenses with which Lira was charged in the instant matter—counts 2 and 3 of the information. The prior offense was relevant to count 2, the charge of unlawful firearm activity, because section 12021, subdivision (e) makes it a criminal offense for a person who has been adjudicated a ward of the juvenile court under Welfare and Institutions Code section 602 for committing an offense listed in section 707 of the Welfare and Institutions Code to possess a firearm until the person reaches the age of 30 years. The prior offense was relevant to count 3 of the information—possession of a firearm by a felon—because that offense requires the defendant to have been convicted previously of a felony (§ 12021, subd. (a)(1)), here alleged to be the 1995 adjudication.

Lira contends that he stipulated to his prior offense for the purposes of count 2 only, and not for count 3. He argues that his conviction on count 3 must be reversed because there was insufficient evidence to support the element of a prior felony conviction. Recognizing that Lira's counsel conceded to the jury that Lira had committed the offense charged in count 3, Lira contends that it was ineffective assistance of counsel for her to do so because the stipulation had covered only count 2 and therefore there was

no evidence to support the prior conviction element of count 3. In so arguing, Lira seeks to capitalize on one statement by the court concerning count 2 and to ignore the clear intent and understanding of all parties and the court that the stipulation to the prior offense was entered into for the purposes of both counts 2 and 3.

During pretrial proceedings, defense counsel indicated to the court that she did not want the jury to know of Lira's previous voluntary manslaughter offense. She asked whether the court would "sanitize" the actual offense rather than allow the jury to know that it was voluntary manslaughter, telling the court that its ruling on this issue would determine whether Lira testified at trial. Lira's counsel explained, "I would like to put Mr. Lira on. That [disclosure of the actual offense] would preclude me from putting him on the stand. I'm afraid if the court knows what—if the jury knows what his prior is, they will get very nervous and will just convict him no matter what the evidence shows." The trial court reserved ruling on this request, and further discussion ensued about Lira pleading guilty to these counts. Lira's counsel said that she did not want the jury to know about Lira's prior felony conviction.

Discussion in the court turned to a possible stipulation to the prior offense. The prosecutor reminded the court that any stipulation would need to include a stipulation that the offense was a listed offense under Welfare and Institutions Code section 707 in order to satisfy the requirements of count 2, and the court began to consider how the stipulation would be worded. After a discussion of the wording of the stipulation, Lira stipulated to his prior offense. The court asked Lira whether he would stipulate to the prior offense "for purposes of count 2." Lira agreed to the stipulation.

After explaining the consequences of the admission, the court asked Lira, "Do you admit, then, that you have suffered the conviction pursuant to Penal Code section 192(a), which is voluntary manslaughter, out of the Superior Court . . . of Stanislaus County in the State of California on June 9, 1995?" Lira replied affirmatively, and his counsel joined in the admission and waivers. The court concluded, "Okay. That stipulation will be accepted. And the court will note he has been advised of his constitutional rights as to

that particular issue, and the court will make reference only to a convicted felon for purposes of counts 2 and 3 at this point in time." At no time did Lira or his counsel inform the court that the stipulation to the prior offense was to be restricted to count 2.

The following day, out of the presence of the jury, the parties and the trial court confirmed the exact language of the stipulation that would be read to the jury. The prosecutor raised the issue by saying, "The People would like to make sure that the potential stipulation for both counts 2 and 3 is acceptable to counsel at this time as we need to introduce it in our case in chief." The prosecutor set forth the stipulation as follows: "The proposed stipulation is that Defendant Anthony Joseph Lira, having a date of birth of April 20, 1978, was age 22 on February 14, 2001. Further that, defendant has suffered a prior felony conviction of a listed offense under Welfare and Institutions Code section 707(b) and was further adjudged a ward of the juvenile court for said violation within the meaning of section 602 of the Welfare and Institutions Code." The defense agreed to the stipulation. The parties then discussed with the court how counts 2 and 3 would be presented to the jury in light of the stipulation.

The stipulation, as agreed upon by the parties, was later presented to the jury. Consistent with the stipulation, the prosecutor did not introduce any other evidence of the prior offense, but simply read the stipulation to the jury prior to resting her case. In her closing argument, the prosecutor referred to the stipulation as establishing elements of both counts 2 and 3. Similarly, Lira's counsel, in her closing argument, conceded that Lira had committed both counts 2 and 3. During the instructions to the jury, the court discussed counts 2 and 3 together and instructed the jury that the prior offense, "an essential element of the crimes charged as it relates to counts 2 and 3," had been established through stipulation.

As a result of the stipulation, defense counsel achieved her tactical goal—the jury was never informed of the nature of Lira's prior offense. Nonetheless, on appeal Lira argues that because in the trial court's original discussion with Lira, the court stated "count 2" instead of "counts 2 and 3," there was no admission to the prior offense for the

purposes of count 3, so there was insufficient evidence to support his conviction on count 3. Lira contends that it was ineffective assistance of counsel for Lira's counsel to concede Lira's guilt to count 3 in closing argument, because the prosecutor had not proven Lira's guilt of this charge beyond a reasonable doubt by failing to introduce evidence of his prior conviction.

Lira is correct that the trial court did state, "for purposes of count 2" the very first time the stipulation was discussed with him by the court. However, it is clear from the record and from the stated goal of Lira's counsel that this stipulation was intended to be an admission to the prior offense for the purposes of the two firearm counts, counts 2 and 3. Lira's counsel wanted to ensure that the jury did not know that Lira had previously committed voluntary manslaughter. The court discussed with the parties that the only way to accomplish that was to stipulate to the prior offense. The parties then so stipulated. When Lira was asked, "Do you admit, then, that you have suffered the conviction pursuant to Penal Code section 192(a), which is voluntary manslaughter, out of the Superior Court . . . of Stanislaus County in the State of California on June 9, 1995?" Lira replied affirmatively, and his counsel joined in the admission and waivers. This stipulation describes the prior offense in a manner that satisfied the requirements of both counts 2 and 3. Because Lira stipulated to the prior conviction in a stipulation that was clearly intended and understood to be a stipulation for both firearm charges, there was sufficient evidence to support his conviction for possession of a firearm by a felon, count 3.

Sufficient evidence for the conviction is also found in Lira's concession of guilt by his counsel in her closing argument. Lira contends that it was ineffective assistance of counsel for his counsel to admit his guilt of count 3 because "there was neither evidence nor a stipulation" to the prior offense. It was not ineffective assistance of counsel for Lira's counsel to act consistently with the stipulation into which she believed the parties had entered. Lira conceded his prior offense for the strategic purpose of avoiding the disclosure of the nature of Lira's prior offense to the jury. Consistent with this aim,

Lira's counsel understood the stipulation to the prior offense to be for both counts 2 and 3, as did all parties involved. No other understanding of the stipulation would make logical sense. If Lira had stipulated to the offense for one count and not the other, Lira would have received no benefit—the jury would still learn that his prior offense was voluntary manslaughter. Such a stipulation would appear to be entirely negative for Lira under the circumstances of this case. Because it was understood by all involved that Lira stipulated to his prior offense for the purposes of counts 2 and 3 and because counsel acted consistently with both that understanding and with the strategic purpose of the stipulation, there was no ineffective assistance of counsel here.

III. Lira's claim that he did not knowingly and intelligently admit his prior conviction because he was not advised that the admission would result in a five-year enhancement is waived because Lira did not object to his sentence in the trial court.

After the jury found Lira guilty of the charges against him, the trial court advised Lira that he had a right to a bench trial on the truth of the prior conviction allegation before the prior conviction could be used in determining his sentence.[3] When Lira responded that he would like to admit his prior conviction, the court advised him that the prior offense was a strike offense and that it had punitive consequences, including a doubling of the sentence imposed on the present offense. Lira was advised of his right to require the state to offer witnesses and documents to prove the prior conviction; his rights to cross-examination and confrontation of witnesses; his right to present evidence on his own behalf; and his right to remain silent. The trial court also advised Lira that "admitting the prior conviction can subject you to increased penalties in this matter."

[3] Lira had previously waived a jury trial on his prior conviction allegation, and that waiver is not challenged on appeal.

Lira stated that he understood these rights and waived them, and then admitted to the prior conviction.

On appeal, Lira contends that his waiver of his rights was insufficient because the trial court did not specifically advise him that he would be subject to a five-year sentence enhancement for his prior conviction pursuant to section 667, subdivision (a)(1). In support of this argument, Lira cites cases in which courts have required that defendants be advised of constitutional and other rights prior to entering pleas. (See, e.g., *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605; *In re Moser* (1993) 6 Cal.4th 342, 351; *In re Yurko* (1974) 10 Cal.3d 857, 863 [holding admissions to prior convictions to be the functional equivalent of a plea for purposes of advisements].)

Advisement of the sentencing consequences of a plea is a "judicially declared rule of criminal procedure" rather than a constitutional requirement. (*In re Yurko*, *supra*, 10 Cal.3d at p. 864; *People v. Wrice* (1995) 38 Cal.App.4th 767, 770.) As the *Wrice* court held, "[A]dvisement of the penal consequences of admitting a prior conviction is not constitutionally mandated. . . . [Citations.] Consequently, when the only error is a failure to advise of the penal consequences, the error is waived if not raised at or before sentencing." (*Wrice*, at pp. 770-771.) Lira did not object to his sentence on or before sentencing. Accordingly, any error in the court's failure to advise Lira of the five-year enhancement consequence of admitting the prior conviction has been waived.

IV. The trial court did not err in imposing consecutive sentences for counts 1 and 2.

The trial court imposed consecutive sentences for the offenses of making criminal threats and unlawful firearm activity. The court stated, "[T]he court will sentence him consecutively on the possession of the firearm since it is mandatory, and the court determined that it did not arise out of the same operative fact and is an independent violation." Lira contends that the trial court erred in concluding it had no discretion to

impose concurrent rather than consecutive sentences because the offenses were committed on the same occasion and arose from the same set of operative facts. Although the standard of review of the trial court's determination of whether consecutive sentences are mandatory or discretionary appears unsettled (*People v. Durant* (1999) 68 Cal.App.4th 1393, 1402, fn. 8), we hold that under any standard of review the trial court did not err.

Section 667, subdivision (c)(6) provides that when a defendant is sentenced under the Three Strikes Law, "[i]f there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count . . . ." The California Supreme Court has explained the provision as follows: "If there are two or more felony convictions 'not committed on the same occasion,' i.e., not committed within close temporal and spacial proximity of one another, *and* 'not arising from the same set of operative facts,' i.e., not sharing common acts or criminal conduct that serves to establish the elements of the current felony offenses of which defendant stands convicted, then 'the court shall sentence the defendant consecutively on each count' pursuant to subdivision (c)(6). Conversely, where a sentencing court determines that two or more current felony convictions were either 'committed on the same occasion' or 'aris[e] from the same set of operative facts' . . . consecutive sentencing is not required under the three strikes law, but is permissible in the trial court's sound discretion." (*People v. Lawrence* (2000) 24 Cal.4th 219, 233 (*Lawrence*).)

The term "committed on the same occasion" generally encompasses a close temporal and spatial proximity between events. (*Lawrence*, *supra*, 24 Cal.4th at p. 233.) Other factors to be considered include whether the offenses were committed simultaneously against the same victims, whether the criminal activity was interrupted, whether any event separated one event from another, and whether one offense was completed before the commission of further criminal acts. (*People v. Jenkins* (2001) 86 Cal.App.4th 699, 706 (*Jenkins*).) For example, when a defendant pointed a gun at four

people seated at a table, demanded their money, and obtained money from two of them, the two resultant counts of robbery and two counts of attempted robbery took place on the same occasion. (*People v. Hendrix* (1997) 16 Cal.4th 508 (*Hendrix*).) Similarly, when a defendant robbed a furniture store, demanding money from two salespersons, a manager, and a store patron, the Supreme Court concluded that these crimes were committed on the same occasion. (*People v. Deloza* (1998) 18 Cal.4th 585 (*Deloza*).) In reviewing the furniture store robbery, the Supreme Court emphasized the fact that not only was there one defined group of victims, but also there was an uninterrupted course of criminal conduct and no "other event that could be considered to separate one 'occasion' of robbery from another." (*Id*. at pp. 595-596.)

Such a separating event was identified in *Lawrence, supra,* 24 Cal.4th 219, in which the defendant stole a bottle of brandy from a market and then, in fleeing, entered a residential backyard and assaulted residents. The Supreme Court found that these offenses were not committed on the same occasion because one offense (the theft) concluded before the others (the assaults) began. As the court noted, the *Lawrence* defendant "chose to commit *new* and *separate* crimes during his flight." (*Id*. at p. 228.) The Supreme Court observed that the two crimes were independent, that they involved two separate (though nearby) locations, two different groups of victims, that they were not simultaneous, and that separate criminal acts were involved. (*Ibid*.)

Here, unlike the facts of *Deloza* and *Hendrix* but like those in *Lawrence*, there was an "event that could be considered to separate one 'occasion' . . . from another." (*Deloza*, *supra*, 18 Cal.4th at p. 596.) Both time and distance—albeit limited time and distance—separated these two offenses. The threat was made in the hotel bar, while the firearm was recovered from Lira upstairs within the hotel approximately 20 minutes after the verbal threat. Even though the jury was permitted to consider Lira's third-floor hand gesture as a subsequent action to determine whether Lira had made a criminal threat, at least 10 minutes separated the recovery of the gun from the hand gesture Lira made when Estese arrived on the third floor of the hotel. Moreover, the events were separate—even

though the threat against Estese involved the suggestion that Lira had a gun, Estese never saw a gun until the police searched Lira. As the firearm offense had no specific victim, the offenses were not committed against the same individuals. The trial court properly concluded that the firearm offense and the criminal threats were "independent"—not committed on the same occasion.

Nor did the offenses of unlawful firearm activity and making criminal threats arise from the same set of operative facts. "The term 'same set of operative facts' means that the two or more separate offenses at issue must share common acts or criminal conduct that serves to establish the elements of each offense." (*Jenkins*, *supra*, 86 Cal.App.4th at p. 706.) None of the conduct comprising the criminal threats offense also satisfied an element of the firearm charge. The threats offense took place at the Sky Bar with Lira's verbal threat and accompanying hand gesture, with the subsequent conduct of Lira on the third floor of the hotel considered by the jury in evaluating whether a threat was made. Lira never displayed a gun to Estese, and the existence of a gun is immaterial to the criminal threats offense. The firearm activity charge was based on the police officers' later recovery of the gun from Lira and upon Lira's status as an individual who previously had been adjudicated a ward of the court for committing voluntary manslaughter. Because the factual basis for each offense is independent, the trial court correctly concluded that the offenses did not arise out of the same operative facts.

Because these offenses were not committed on the same occasion and did not arise out of the same operative facts, the trial court correctly concluded that consecutive sentencing was mandatory for counts 1 and 2 pursuant to section 667.5, subdivision (c)(6).

V. CALJIC No. 17.41.1

Lira complains of the trial court's use of CALJIC No. 17.41.1: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as

required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation." Lira contends that CALJIC No. 17.41.1 compromises the privacy of jury deliberations and creates a chilling and coercive influence on the jury deliberations that inhibits individual jurors from exercising independent judgment and expressing their views candidly. He argues that the instruction deprives defendants of their rights to a jury trial and to a unanimous verdict.

The California Supreme Court rejected these constitutional arguments in *People v. Engelman* (2002) 28 Cal.4th 436. The Supreme Court ruled that although CALJIC No. 17.41.1 should not be given in the future because of its risk of chilling jury deliberations, giving the instruction does not violate a defendant's constitutional rights to a trial by jury and to a unanimous jury verdict. (*Id*. at pp. 439-440.)

Moreover, the record does not indicate that the use of CALJIC No. 17.41.1 had any effect on the outcome here. Although the jury did experience difficulty reaching a verdict on count 1, its communications with the judge demonstrated that the jury was debating the substantive issue of how to interpret and apply a jury instruction. The court inquired generally as to whether deliberations were ongoing by asking the foreperson whether the holdout juror "is not deliberating with you or just disagrees with the rest of the jurors?" The foreperson explained, "My opinion is he just disagrees. Some of the other jurors believe he's being hard headed and not deliberating, but I think he had his reasons and he's been explaining what his reasons are, but we've been basically going back and forth trying to see if we can convince him and giving different views." The foreperson told the court that he saw no reason to inquire further whether the juror was refusing to follow the law, confirming that the juror in question was actively involved in deliberations. The trial court conducted no further inquiry into the jury's deliberations. Additional indications that the jury's deliberations consisted of substantive debate rather than pressure on a holdout juror are that all the jury's communications with the court

concerned the elements of the offense of making criminal threats and when the trial court gave further instructions on the law of criminal threats to the jury, the jury reached a verdict within a few minutes. Lira, therefore, has failed to demonstrate prejudicial error in the use of CALJIC No. 17.41.1.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

TURNER, P.J.

ARMSTRONG, J.